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Washington, D.C., 03 December 2001

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RE: Pope & Talbot Inc. v. Government of Canada
Post-Hearing Submission of the United Mexican States (Damages Phase)

The United Mexican States (Mexico) makes this submission pursuant to Article 1128 of the NAFTA and the directions of the President of the Tribunal given at the conclusion of the hearing of the Damages Phase.

Having heard the evidence adduced in the hearing, the oral submissions of the disputing parties, and the questions and remarks of members of the Tribunal, Mexico wishes to elaborate only on the issues discussed below. Mexico's failure to comment further on any other issue raised in the proceeding should not be taken to constitute concurrence or disagreement with the positions advanced by the disputing parties.

Mexico affirms and continues to rely on its submissions dated 25 April, 1 October and 6 November 2001.

A. Article 1105

1. Applicability of the FTC Interpretation

1. The Tribunal challenged counsel for Canada on the question of whether the Free Trade Commission's (FTC) Note of Interpretation of Article 1105 must be applied retroactively in this proceeding. Counsel submitted that the interpretation, although not retroactive *per se*, must be

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pplied in all of the Tribunal's further work, including its determination as to whether particular heads of damage now claimed properly arise from a breach (or breaches) of Article 1105, as now understood by the Tribunal. Members of the Tribunal pointed out that this would necessarily require reconsideration of its earlier finding that aspects of the verification review episode amounted to a breach of Article 1105 which caused the Claimant to suffer damages, and thus Canada's position must be that the FTC interpretation has retroactive effect.

2. Mexico has indicated in its earlier submissions that this is a question of applying the governing law, which has not changed, and therefore cannot be interpreted as having retroactive effect. Semantics aside, however, Mexico respectfully submits that Article 1131(2) requires a Tribunal to apply a binding interpretation of the FTC as long as it remains constituted and that this may, in the circumstances of a particular case, entail reconsideration and revision of findings already made. Thus, until a Tribunal is *functus officio* in a particular case, it must consider and apply a binding interpretation of the FTC, and give the interpretation corrective effect.

3. The FTC's exercise of corrective jurisdiction was in part stimulated by the failure of this and other Chapter Eleven tribunals to give effect to the shared views of the NAFTA Parties, notwithstanding the rules of interpretation in Article 31 of the *Vienna Convention on the Law of Treaties*, notably paragraphs 3(a) and (b). Under NAFTA Article 1131(2) this Tribunal has now been given an opportunity to correct itself; this may obviate the need for judicial review based on failure to apply the governing law[1].

4. In the circumstances of this case, the Tribunal has made a number of findings in connection with the verification review episode and has held that "in its totality, the SLD's treatment of the Investment during 1998 in relation to the verification review process is nothing less than a denial of the fair treatment required by NAFTA Article 1105...". The Tribunal accordingly held Canada liable for the "resultant damages".

5. Mexico respectfully submits that the Tribunal must now consider whether each of the findings it made in connection with the verification review episode is a measure[2] amounting to a breach of Article 1105, as now understood by the Tribunal under the governing law, which gives rise to loss or damage of the kind now claimed, bearing in mind the Tribunal's existing findings of breach:

- Was Canada's requirement in April 1999 that the quota-holder (*i.e.*, the Investment[3]) submit to verification review at its business premises in Canada instead of the Investor's business premises in Portland, Oregon —without first

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1. See the ICSID Annulment Committee decision in *MINE v. Guinea*, where it is stated that the tribunal's disregard for the agreed rules of law would constitute a derogation from the terms of reference from which the tribunal has been authorized to function and that such would entail a manifest excess of power. 4 ICSID Reports 79, at 87.

2. Article 201 defines measure as including "any law, regulation, requirement or practice". Article 1101 provides that it must be a measure "relating to ... investors or another Party [or] investments of investors of another Party..." in order to fall within the scope and coverage of Chapter Eleven.

3. Article 1105 only applies to the investments of investors of the other Parties, not to investors themselves.

establishing and communicating its legal authority for same— a measure which violated customary international law and caused any of the loss or damage now claimed?[4]

- Was Canada's failure to fairly and accurately recite the facts and circumstances of the verification review in SLD's memoranda to the Minister, first in June 1999 and later in November 1999, a measure which violated customary international law and caused any of the loss or damage now claimed?[5]

- Was Canada's failure in July or August 1999 to provide the quota-holder with a copy of the verification review report and to seek its comments on the findings before taking further action a measure which violated customary international law and caused any of the loss or damage now claimed?[6]

- Did any or all of the above acts or omissions (assuming they are "measures"), when viewed collectively, amount to treatment which fell below the minimum standard prescribed by Article 1105 that caused any of the loss or damage now claimed?

6. Mexico respectfully submits that the Tribunal should only award damages for loss or damage that the Claimant has shown, through cogent evidence, would not have been suffered "but for" any breach(es) of Article 1105 as now understood by the Tribunal.

2. The Threshold for Breach of Article 1105

7. Members of the Tribunal challenged counsel for Canada on the question of whether the standard propounded in *Neer* continues, eighty years later, to define the minimum standard of treatment recognized at international law.

8. Mexico submits that the test in *Neer* does continue to apply and concurs in Canada's view that "[t]he conduct of government toward the investment must amount to gross misconduct, manifest injustice or, in the classic words of the *Neer* claim, an outrage, bad faith or the willful neglect of duty"[7]. Mexico also agrees that the standard is relative and that conduct which may not have violated international law the 1920's might very well be seen to offend internationally accepted principles today.

9. Mexico further submits that useful guidance can be found in the 1989 decision of the Chamber of the International Court of Justice in the *Case Concerning Elettronica Sicula S.P.A. (ELSI)*[8]. With respect to arbitrariness, the Court propounded the following test:

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4. As per the Tribunal's findings at paragraphs. 172 to 175, Award on the Merits of Phase 2.
5. Ibid. at paragraphs. 177 to 179.
6. Ibid. at paragraph 176 and the end of paragraph 179.
7. Counter-Memorial (Phase 2), paragraph 309.
8. 1989 I.C.J. 15

> "Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. This idea was expressed by the court in the *Asylum* case, when it spoke of 'arbitrary action' being 'substituted for the rule of law' ... It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety..."[9] [Emphasis added]

10. It is clear from this relatively recent observation of the ICJ that the threshold to establish a breach of customary international law continues to be high; one which requires conduct of a very serious nature, amounting to a significant departure from internationally accepted legal norms.

11. Mexico accordingly concurs with Canada's observation that only egregious conduct should be seen to offend Article 1105 and submits that it should be a very rare occasion that a Party could be found to have breached Article 1105.

3. Relevance of the NAFTA Parties' BITs and FIPAs

12. In his closing submissions, counsel for the Claimant pointed out that the NAFTA Parties have entered into bilateral investment treaties (BITs) —or, in Canada's case, foreign investment protection agreements (FIPAs)— which contain language describing the minimum standard of treatment that differs from the language of Article 1105. Counsel also noted that the Parties entered into some of these BITs and FIPAs with other countries after the NAFTA entered into force.

13. Mexico respectfully submits that the content of other BITs and FIPAs, whether negotiated before or after the NAFTA entered into force, is wholly irrelevant to the interpretation and application of Article 1105 in this proceeding. The FTC's interpretation of Article 1105 is conclusive and binding on this Tribunal.

14. For its own part, Mexico wishes to record that all its bilateral Agreements for the Reciprocal Protection and Promotion of Investments and other international agreements that contain investment protection provisions are intended to accord a minimum standard of treatment based on customary international law and that it has not offered or agreed to accord the investors or investments any other country a better minimum standard than it has to the investors and investments of the NAFTA Parties under Article 1105, as interpreted by the FTC.

15. Mexico believes the other countries with which Mexico and the other NAFTA Parties have entered into BITs, FIPAs and like agreements have proceeded in the same expectation, namely, that the minimum standard is defined by customary international law, as reflected in the *Notes and Comments* to the 1967 draft OECD convention on the protection of foreign property:

> The phrase "fair and equitable treatment", customary in relevant bilateral agreements, indicates the standard set by international law for the treatment due by each State with regard to the property of foreign nationals. The standard requires that – subject to essential security interests ... protection afforded under the Convention shall be that

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9. Ibid. at page 76.

generally accorded by the Party concerned to its own national, but, being set by international law, the standard may be more exacting where rules of national law or national administrative practices fall short of the requirements of international law. The standard required conforms in effect to the "minimum standard" which forms part of customary international law.[10] [Emphasis added.]

B. Article 1102

16. Members of the Tribunal indicated in remarks at hearing that, if bound to apply the FTC's Note of Interpretation of Article 1105 "retroactively", the Tribunal should be entitled to consider whether Canada's conduct in the verification review episode amounted to denial of national treatment, in violation of Article 1102. It was suggested that, in its deliberations in Phase 2, once the Tribunal concluded that aspects of the verification review episode constituted a breach of Article 1105, there was no need to consider whether Canada's conduct also constituted a breach of Article 1102. It was also suggested that the Tribunal would be unable to "finish its work" unless it can now consider whether Canada failed to meet its obligations under Article 1102.

17. A review of the pleadings, correspondence and transcripts in Mexico's possession does not reveal any allegation by the Claimant, or any prior indication by the Tribunal, that the verification review episode could engage liability under Article 1102. To Mexico's knowledge, neither of the disputing parties adduced any evidence in connection with this the issue and neither they nor the non-disputing NAFTA Parties made any submissions on the interpretation of Article 1102 in connection with this issue. Rather, the evidence and legal submissions were directed to the Tribunal's thorough examination, in Phase 1 and Phase 2 of the proceeding, of the denial of national treatment allegation raised by the Claimant in connection with the implementation and administration of Canada's export control regime for softwood lumber.

18. Mexico respectfully submits that a new finding of liability based on Article 1102 would rightly be perceived as calculated to circumvent the FTC interpretation of Article 1105 —an interpretation which reflects the common submissions of all of the NAFTA Parties in Phase 2 of this proceeding which were disregarded by the Tribunal— and thereby avoid applying the governing law. Mexico further submits that such a finding would be susceptible to being set aside on the further grounds that the Tribunal decided a claim that was not submitted to arbitration by the disputing parties, and that Canada was not given an opportunity properly to defend this new claim.

19. As to the proper interpretation of Article 1102, Mexico respectfully disagrees with the interpretation propounded by the Tribunal's Award on the Merits of Phase 2. Mexico reaffirms its previous submissions on this issue in Phase 1 and Phase 2 of this proceeding, in particular pages 1 to 3 of its Phase 2 Post-hearing Submission —including its express concurrence with the submissions of the other Parties, as stated therein.

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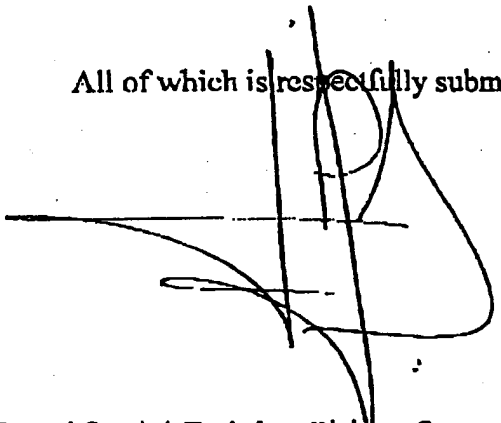
10. Notes and Comments to Article 1 of the *Draft Convention on the Protection of Foreign Property and Resolution of the Council of the OECD on the Draft Convention*, at paragraph 4 (a)

0. In common with the other Parties, Mexico submits that breach of Article 1102 requires a finding of *de jure* or *de facto* discrimination based on nationality. There must be cogent evidence allowing analysis of how the host Party treats its investors in comparison to its treatment of investors of the other Parties, in like circumstances, in order to discern whether such discrimination existed or occurred. In the circumstances of this case, it would not be enough merely to show or believe that some other party received better treatment than the Claimant in its relationship with government, or for the Tribunal to engage in speculation as to how Canadian-owned quota-holders "in like circumstances" were or might have been treated.

All of which is respectfully submitted



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